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U.S. Supreme Court, U. S.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

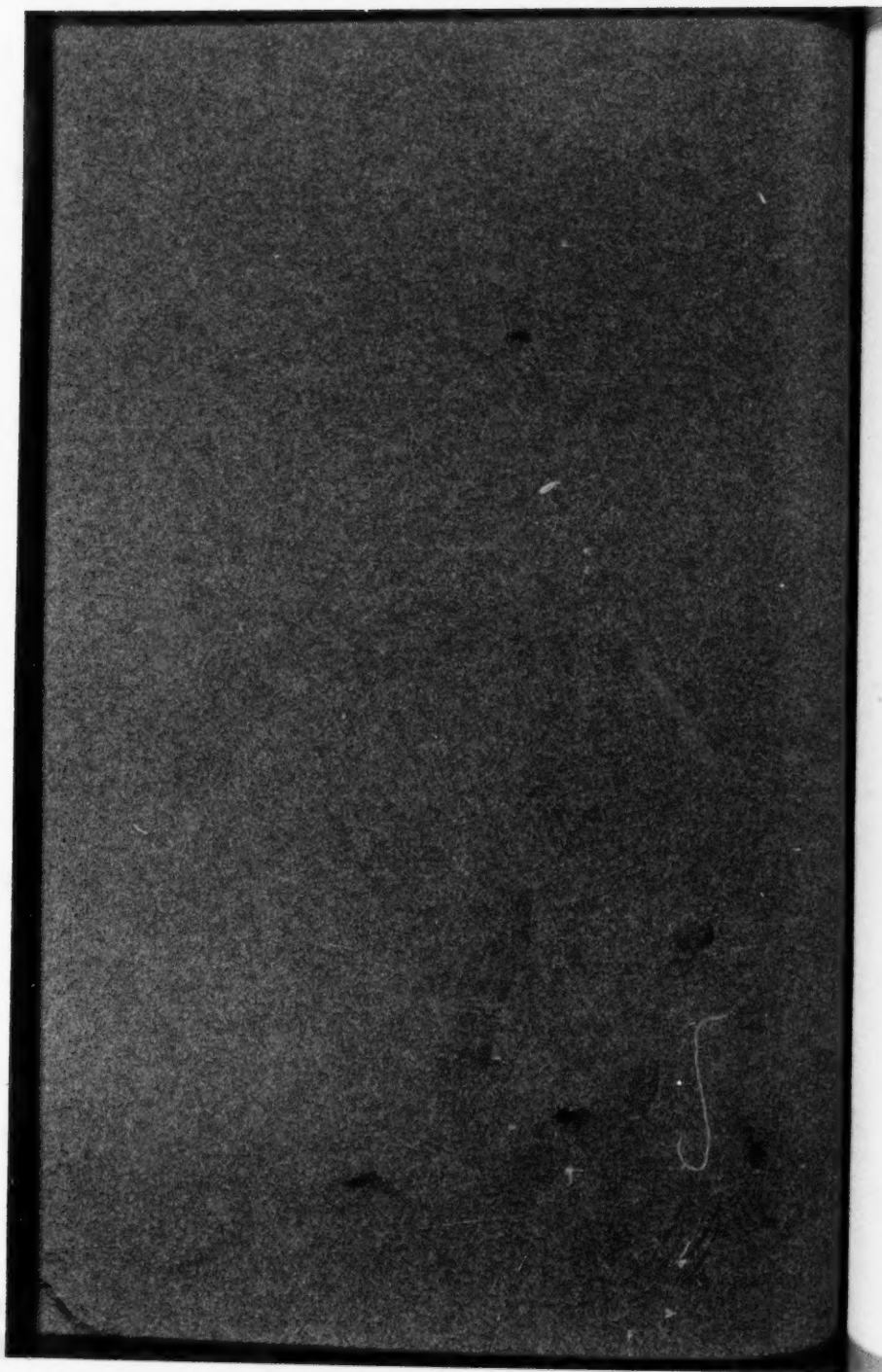
No.

583

THE UNITED STATES OF AMERICA UPON THE RE-
LATION AND FOR THE USE OF THE TENNESSEE
VALLEY AUTHORITY PETITIONERS

W. V. N. POWELL & ASSOCIATES AND OTHERS WITH
INTEREST IN SOUTHERN POWER COM-
PANY A CORPORATION ET AL.

ON PETITION FOR WRIT OF HABEAS CORPUS TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. —

THE UNITED STATES OF AMERICA UPON THE RE-
LATION AND FOR THE USE OF THE TENNESSEE
VALLEY AUTHORITY, PETITIONER

vs.

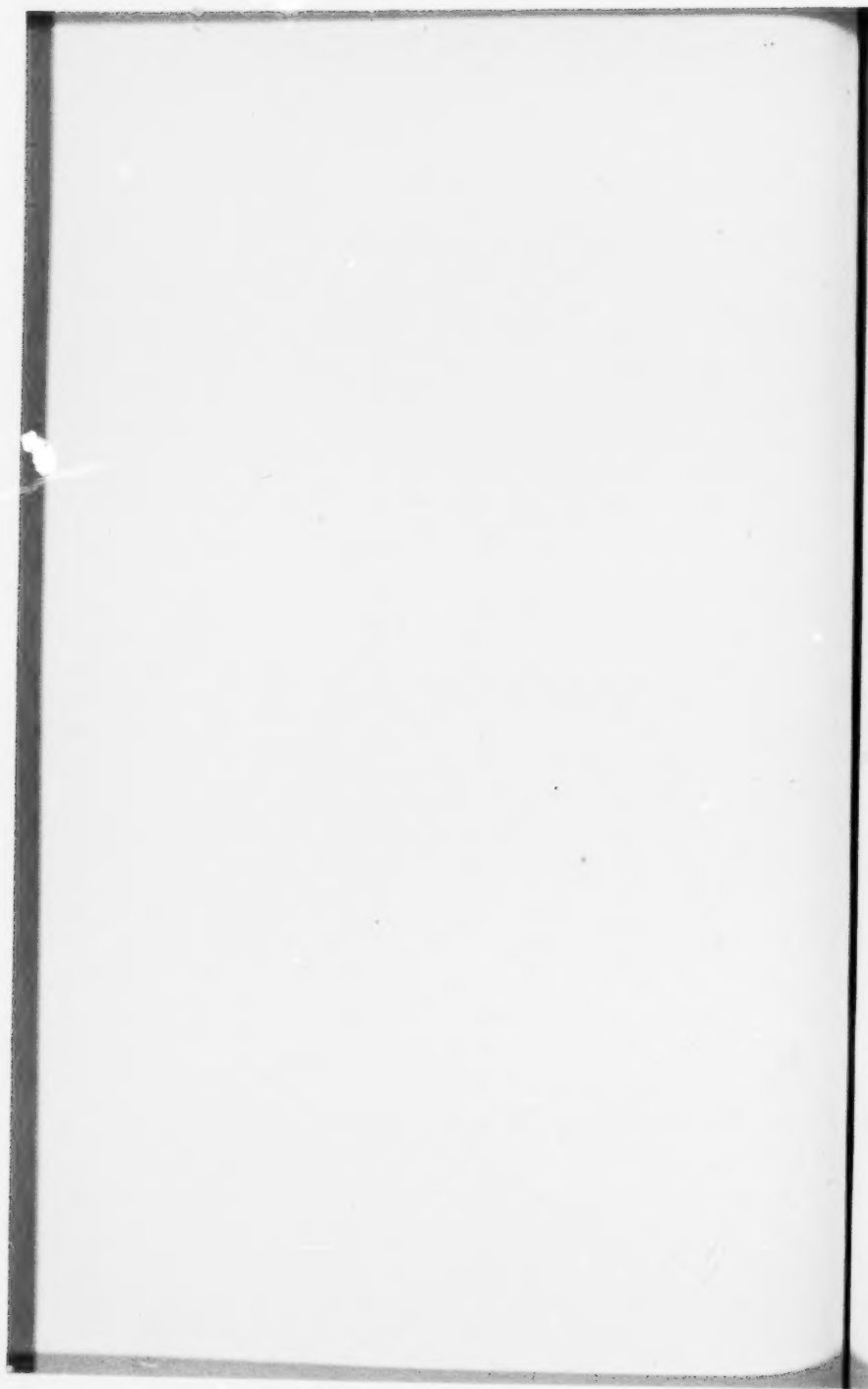
W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN
INTEREST OF SOUTHERN STATES POWER COM-
PANY, A CORPORATION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I



In United States Circuit Court of Appeals, Fourth Circuit

Mandate of the Supreme Court of the United States

Filed July 8, 1943

UNITED STATES OF AMERICA, ss:

The PRESIDENT OF THE UNITED STATES OF AMERICA:

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Fourth Circuit, in a cause between The United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, Appellant and Cross-appellee, and W. V. N. Powelson, Assignee and Successor in Interest of Southern States Power Company, et al., Appellee and Cross-appellant, No. 4679, wherein the judgment of the said Circuit Court of Appeals, entered in said cause on the 10th day of March, A. D. 1941, is in the following words, viz:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, modified by excluding therefrom the allowance of \$100,000 severance damages for the taking of the Murphy plant with interest on that amount; affirmed as to the award of \$18,902.02 as damages to the Nottely property, if, within thirty days from the date the mandate is filed in the District Court, the Union Power Company, the subsidiary of the Southern States Power Company, shall make itself a party to the cause in such way as to be bound by the judgment; otherwise it is modified by eliminating therefrom this item of \$18,902.02 with interest allowed thereon, as set forth in the opinion of the Court filed herein, and, as so modified, it is affirmed; that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of North Carolina, at Asheville, for further proceedings in accordance with the opinion of this Court; and that each party pay its own costs on the appeals."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-two, the said
3 cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:
On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed.
And it is further ordered, that this cause be, and the same is hereby remanded to the said Circuit Court of Appeals for proceedings in conformity with the opinion of this Court.

May 17, 1943

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Harlan F. Stone, Chief Justice of the United States, the seventh day of July, in the year of our Lord one thousand nine hundred and forty-three.

CHARLES ELMORE CROPLEY,
*Clerk of the Supreme Court
of the United States.*

September 3, 1943, the original transcript of record and certain volumes of Exhibits are received from the Clerk of the Supreme Court.

In the United States Circuit Court of Appeals for the
Fourth Circuit

No. 4679

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE
OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER
v.

4 W. V. N. POWELSON, RESPONDENT

Notice of motion for final award
Filed Sept. 27, 1943

To: G. LYLE JONES, Esq., and GEORGE H. WRIGHT, Esq., Attorneys
for Respondent:

Please take notice that the within motion is being filed with the clerk and will be presented to the Court for consideration at the hearing to be held at Richmond, Virginia, on October 5, 1943.

WILLIAM C. FITTS, Jr.,
William C. Fitts, Jr.,
*General Counsel,
Attorney for petitioner.*

I hereby certify that copies of the above notice, together with the motion referred to therein, have been mailed to G. Lyle Jones, Esq., and George H. Wright, Esq., Asheville, North Carolina, attorneys of record for the respondent, on this September 25, 1943.

WILLIAM C. FITTS, JR.
William C. Fitts, Jr.

In United States Circuit Court of Appeals

Motion for final award

Filed September 27, 1943

Now comes the petitioner and moves the Court to proceed in accordance with the mandate, and under the authority of section 25 of the Tennessee Valley Authority Act, to fix the value of the property condemned and make a final award in this cause on the record now before the Court.

Respectfully submitted.

WILLIAM C. FITTS, JR.,
William C. Fitts, Jr.
General Counsel.

CHARLES J. MCCARTHY,
Charles J. McCarthy, .

ROBERT H. MARQUIS,
Robert H. Marquis,
Attorneys for petitioner.

5 In United States Circuit Court of Appeals, Fourth
Circuit

No. 4679

THE UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE
USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT AND
CROSS-APPELLEE

vs.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF
SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL., AP-
PELLEE AND CROSS-APPELLANT

Cross-Appeals From the District Court of the United States for
the Western District of North Carolina, at Asheville

*Order setting aside judgment of March 10, 1941, and recalling
mandate*

Filed and entered October 4, 1943

This Court having at its March term, 1941, rendered its decision modifying and, as so modified, affirming the judgment of the said District Court appealed from in this cause, and said cause having been taken to the Supreme Court of the United States by virtue of a writ of certiorari, and the mandate of the said Supreme Court, reversing the judgment of this Court entered in this cause on March 10, 1941, and remanding the cause to this Court for proceedings in conformity with the opinion of the said Supreme Court, having been filed in this Court on July 8, 1943:

Now, in pursuance of said mandate of the Supreme Court of the United States,

It is ordered and adjudged by this court that the judgment entered by this Court, in this cause, on March 10, 1941, be, and the same is hereby, set aside and annulled; that the mandate of
6 this Court, issued and transmitted to the said District Court on May 16, 1941, be, and the same is hereby, recalled; that the Clerk of the said District Court for the Western District of North Carolina return said mandate to the Clerk of this Court forthwith; and that this cause be, and the same is hereby, restored to the docket. October 4th, 1943.

JOHN J. PARKER,
Senior Circuit Judge.

Same day, to wit, October 4, 1943, twenty-five copies of memorandum in support of motion for final award are filed.

In United States Circuit Court of Appeals

Minute entry of argument and submission

October 5, 1943 (October Term, 1943), cause came on to be heard before PARKER, SOPER, and DOBIE, Circuit Judges, and was argued by counsel and submitted.

In United States Circuit Court of Appeals

Amendment to motion for final award

Filed October 8, 1943

Now comes the petitioner and amends the motion for final award previously filed in this Court by adding thereto the following alternative prayers.

1. Petitioner prays that in the event this Court denies petitioner's motion to fix the value of the property condemned and determines instead to remand the cause to the District Court, it will limit said remand to a determination of the value of the property condemned on the present record, excluding from consideration any value alleged to result from the adaptability of the property for power or reservoir purposes.

2 In the alternative that, in the event this Court determines to remand the cause to the District Court for the taking of additional evidence, it will in the order of remand limit the additional evidence to be taken to evidence concerning the value of the land condemned without reference to its claimed value for power or reservoir purposes, and will instruct the District Court to exclude the question of value allegedly resulting from the adaptability of the property for power or reservoir purposes from consideration.

Respectfully submitted.

William C. Fitts, Jr.,
William C. Fitts, Jr.,
General Counsel.

CHARLES J. MCCARTHY,
Charles J. McCarthy,
Assistant General Counsel.

ROBERT H. MARQUIS,
Robert H. Marquis,
Attorneys for Petitioner.

I hereby certify that I have on this 6th day of October 1943, mailed a copy of the above Amendment to Motion for Final Award to G. Lyle Jones, Esq., and George H. Wright, Esq., Asheville, North Carolina, attorneys of record for the respondent.

ROBERT H. MARQUIS.
Robert H. Marquis.

Same day, to wit, October 8, 1943, the mandate of this Court issued and transmitted to the District Court on May 16, 1941, is received from the Clerk of the District Court.

In United States Circuit Court of Appeals,
Fourth Circuit

No. 4679

THE UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE
USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT AND
CROSS-APPELLEE

vs.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF
SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL.,
APPELLEE AND CROSS-APPELLANTCross-Appeals from the District Court of the United States for
the Western District of North Carolina, at Asheville

(Argued October 5, 1943. Decided October 8, 1943)

Before PARKER, SOPER, and DOBIE, Circuit Judges

William C. Fitts, Jr., General Counsel, Tennessee Valley Authority (Charles J. McCarthy, Assistant General Counsel, Tennessee Valley Authority, and Robert H. Marquis on brief) for Appellant and Cross-Appellee, and G. Lyle Jones and George H. Wright for Appellee and Cross-Appellant.

Opinion

Filed October 8, 1943

9 PARKER, Circuit Judge:

The decision of this Court, rendered on March 10, 1941, was to the effect that the award of damages by the District Court for property condemned by the United States should be modified by eliminating certain items from the award of damages and that, as so modified, the judgment appealed from should be affirmed. United States v. Powelson, 4 Cir. 118 F. 2d 79. This decision was reversed by the Supreme Court because that Court was of the view that in arriving at the award of damages certain elements had been included in the valuation of the property which should not have been considered. United States v. Powelson, — U. S. —, 63 S. Ct. 1047, 1057. We have given careful consideration to what should be the future procedure in the case, and are of the opinion that it should be remanded to the District Court for further proceedings in accordance with the principles laid down by the

Supreme Court, and with leave to the parties to produce additional testimony, if they so desire.

In reversing the decision of this Court, the Supreme Court held that the respondent's privilege to use the power of eminent domain might not be considered in determining whether there was a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future, and that respondent had not established the basis for proof of the "water power value" which was asserted, except upon the assumption that it possessed the power of eminent domain. The limited nature of the decision was shown by the opening sentence of the next to the last paragraph of the opinion wherein the Court said:

10 "We hold only that profits, attributable to the enterprise which respondent hoped to launch, are inadmissible as evidence of the value of the lands which were taken."

The Court went on to say:

"Respondent is, of course, entitled to the market value of the property fairly determined. And that value should be found in accordance with the established rules (*United States v. Miller*, *supra*)—uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain."

The *Miller* case cited in the excerpt from the opinion goes fully into the principles to be applied in determining valuation and states that "the market value of the property is to be fixed with due consideration of all its available uses," citing *Boom Co. v. Patterson*, 98 U. S. 403, 408. The rule is thus stated in the case last cited:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate

11 a rule to govern its appraisalment in all cases. Exceptional

circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

Nothing said by the Supreme Court changes in any way the rule as to damages laid down in *Olson v. United States*, 292 U. S. 246, 256, from which we quoted in our opinion as follows:

"The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. (*Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 408, 25 L. Ed. 2-6; *Clark's Ferry Bridge Co. v. Public Service Comm.*, 291 U. S. 227, 54 S. Ct. 427, 78 L. Ed. 767; 2 *Lewis, Eminent Domain*, 3d Ed. Sec. 707, p. 1233; 1 *Nichols, Eminent Domain*, 2d Ed. Sec. 220, p. 671). The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service (*New York v. Sage*, 239 U. S. 57, 61, 36 S. Ct. 25, 60 L. Ed. 143). It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors not only for tracts held in single ownership but also for rights of way, locations, sites, and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account" (*Mississippi & R. River Boom Co. v. Patterson*, *ubi supra*).

The difficulty presented by the record in this case is that the evidence of value produced by the owner was based almost entirely on profits of the enterprise which he hoped to launch, whereas the evidence on the other side consisted almost entirely of the opinions of those who valued the land merely as wild mountain land without reference to any value it might have because of its availability as a power site. Opinions of persons knowing nothing of the value of land for water power purposes are not a fair criterion of its value, where there is evidence that it is available for such purposes. Persons in the immediate neighborhood may not be in position to testify as to such value, but there may be others who are qualified to testify. Certainly one

who has embarked upon the enterprise of a great water power development, has purchased and brought together thousands of acres of land for the purpose and spent hundreds of thousands of dollars in the enterprise, is entitled to have his holdings valued on some other basis than that of numerous small separated tracts of wild mountain land, if it be found, irrespective of the possession of the power of eminent domain by the landowner, that "there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future." Market value is nothing but a hypothetical concept based upon what, in the opinion of those who know, a willing buyer would have to pay a willing seller of property in order to purchase it. The question here is, not what wild mountain land was selling for in the community, but what would the portion of land owned by Powelson and available for this water power development have been reasonably worth on the market

13 when sold by one who was willing but not compelled to sell and bought by one who was willing but not compelled to buy. In arriving at this valuation, it is proper that those who make it take into consideration the fact that a large body of land has been brought together under one ownership and any special value that it may have acquired because of this fact.

If the parties desire to adduce additional evidence on this question in the light of the Supreme Court's decision, they should be allowed to do so. If they do not so desire, the valuation should at all events be made in the first instance by the court below, because of the opportunity which the judges and commissioners of that court have had to view the land and hear the witnesses as to valuation testify. The judgment below will accordingly be reversed and the case will be remanded to the District Court for further proceedings not inconsistent herewith.

14 In United States Circuit Court of Appeals,
Fourth Circuit

No. 4679

THE UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE
USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT AND
CROSS-APPELLEE

v's.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF
SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL.,
APPELLEE AND CROSS-APPELLANT

Cross-Appeals from the District Court of the United States for
the Western District of North Carolina

Judgment

Filed and Entered October 8, 1943

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of North Carolina, at Asheville, for further proceedings not inconsistent with the opinion of the Court filed herein; and that each party pay its own costs on the appeals.

October 8, 1943.

JOHN J. PARKER,
Senior Circuit Judge.

October 11, 1943, Petition of Appellant and Cross-Appellee for a stay of mandate filed.

In United States Circuit Court of Appeals

Order staying mandate

Filed and Entered October 11, 1943

15 Upon the application of the appellant and cross-appellee, by its counsel William C. Fitts, Jr., Charles J. McCarthy, and Robert H. Marquis, Esquires, and for good cause shown:

It is ordered by this Court that the mandate of this Court in the above-entitled cause be, and the same is hereby, stayed pending petition of the appellant and cross-appellee in the Supreme Court of the United States for a writ of mandamus and prohibition, unless otherwise ordered by this or the said Supreme Court, provided said petition for a writ of mandamus and prohibition be filed in the said Supreme Court within two weeks of this date.

October 11, 1943.

JOHN J. PARKER,
Senior Circuit Judge.

October 14, 1943, the appearance of G. H. Wright is entered for the Appellee and Cross-Appellant.

In United States Circuit Court of Appeals

Order authorizing clerk to use original transcripts of records in making up records for use in the Supreme Court of the United States on application for writs of certiorari

For reasons appearing to the Court, it is ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further ordered that a copy of this order be incorporated in said certified transcripts of records, January 9th, 1941.

JOHN J. PARKER,
Senior Circuit Judge.

17 [Clerk's certificate to foregoing transcript omitted in printing.]

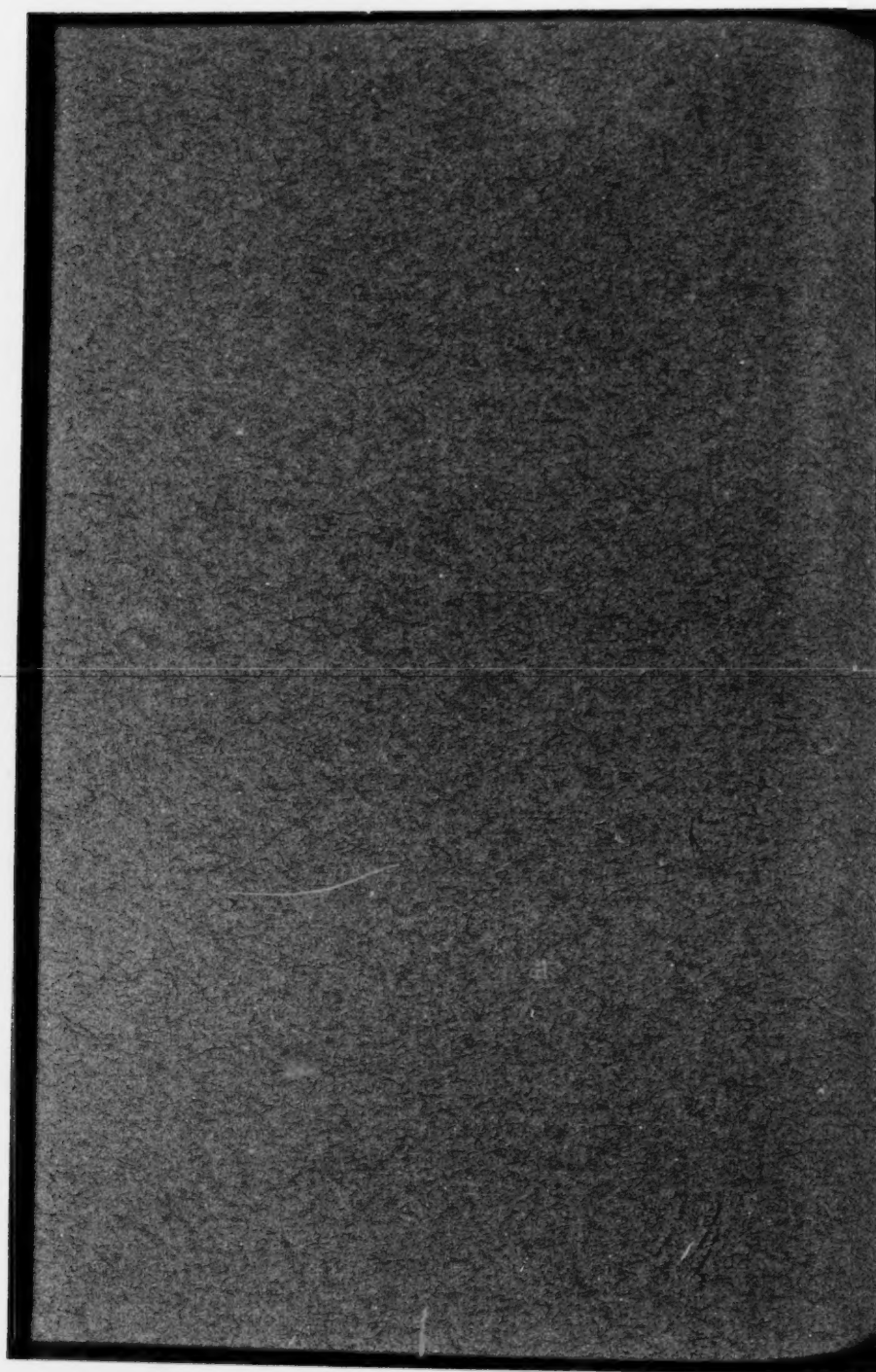


John [illegible]

United States of America

W. V. [illegible]

PETITION FOR A WRIT OF HABEAS CORPUS
STATE OF [illegible]
OCTOBER



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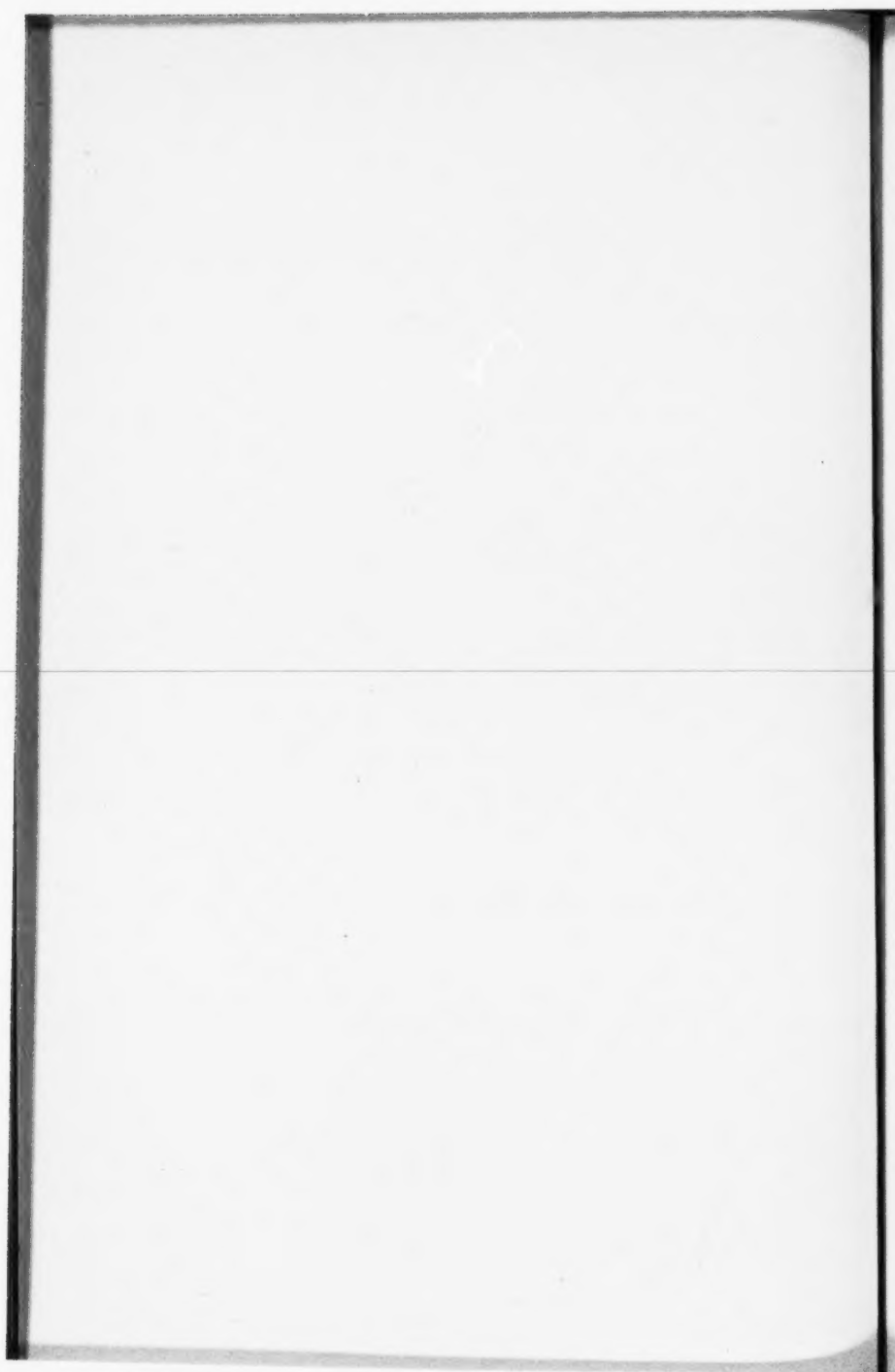
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

UNITED STATES OF AMERICA UPON THE RELATION
AND FOR THE USE OF THE TENNESSEE VALLEY
AUTHORITY, PETITIONER

v.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN
INTEREST OF SOUTHERN STATES POWER COMPANY,
A CORPORATION, ET AL., RESPONDENT

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT*

The Solicitor General, on behalf of the United States of America, acting upon the relation and for the use of the Tennessee Valley Authority, prays that a writ of certiorari issue to review the order of October 8, 1943, of the United States Circuit Court of Appeals for the Fourth Circuit remanding the case to the District Court of the United States for the Western District of North Carolina, with instructions to permit the respondent to introduce additional evidence as to the alleged value for power purposes of lands of the respondent condemned by the petitioner.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 6-9) is not yet reported.

JURISDICTION

The order of the circuit court of appeals sought to be reviewed was entered on October 8, 1943. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, after this Court has ruled that respondent is not entitled to compensation for any alleged water-power value with respect to lands condemned, the Circuit Court of Appeals has authority to remand the cause to the District Court for a new trial, with permission to receive evidence on the issue of water-power value and to include ⁱⁿ the final award ~~an~~ allowance for said water-power value.

2. Whether, if it be determined that the issue of water-power value has not been removed from this case by the prior decision of this Court, such value should be excluded upon the principles of *United States v. Chandler-Dunbar Co.*, 229 U. S. 53.

STATUTE INVOLVED

The appendix, *infra*, pages 14-17, contains the applicable provisions of the Tennessee Valley Authority Act of 1933.

STATEMENT

On January 28, 1936, the United States, on behalf of the Tennessee Valley Authority, filed a petition in the United States District Court for the Western District of North Carolina to condemn certain lands in and adjacent to the Hiwassee River, a major tributary of the Tennessee River.

In accordance with the procedure prescribed by section 25 of the Tennessee Valley Authority Act, evidence concerning the value of the land condemned was heard, and an award was made by three commissioners appointed by the District Court. Cross-appeals were taken from this award to a three-judge district court, which heard additional evidence and made a revised award. Cross-appeals were taken from the decision of the district court to the United States Circuit Court of Appeals for the Fourth Circuit, which, after hearing argument, entered judgment affirming, with modifications, the decision of the district court.

Thereafter, petitioner sought, and on October 13, 1941, this Court granted, a writ of certiorari to review the judgment of the Circuit Court of Appeals. The case was docketed in this Court as *United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, Petitioner v. W. V. N. Powelson, Assignee and Successor in Interest of Southern*

States Power Company, a Corporation, et al., October Term, 1941, No. 500, and was argued before this Court on March 12, 1942. It was subsequently restored to the docket, October Term, 1942, No. 3, and reargued on March 1, 1943.

The basic issue presented in this Court was whether the inclusion of water-power value in respondent's award was proper. On May 17, 1943, this Court rendered its decision, holding that water-power value should not have been included in respondent's award and remanding the cause to the Circuit Court of Appeals for further proceedings not inconsistent with this Court's opinion. On July 8, 1943, this Court's mandate was issued, directed to the United States Circuit Court of Appeals for the Fourth Circuit (R. 1-2).

On October 5, 1943, petitioner moved the Circuit Court of Appeals to proceed, in accordance with the mandate of this Court and under the authority of section 25 of the Tennessee Valley Authority Act, to fix the value of the property condemned without reference to its alleged value for power or reservoir purposes. On October 8, 1943, the court denied petitioner's motion and entered an order remanding the cause to the District Court for the taking of additional evidence, including evidence relating to the value of the land condemned for water-power purposes, and the making of a new award including water-power value (R. 6-10).

On November 15, 1943, petitioner filed with this Court a motion for leave to file a petition for writ of mandamus requiring the Circuit Court of Appeals to vacate and cancel its order of October 8, 1943, and commanding it either to proceed to fix the value of the property condemned without reference to its alleged value for power or reservoir purposes or to remand the cause to the District Court under a mandate instructing that court to proceed to make an award fixing the value of the property without reference to such alleged power and reservoir value. In the alternative, petitioner asked that a writ of prohibition issue prohibiting the Circuit Court of Appeals from remanding the cause to the District Court (a) for the taking of any additional evidence whatsoever or, (b) in the alternative, for the taking of any evidence relating to the alleged value of the land condemned for power or reservoir purposes. This motion was denied on December 6, 1943, without prejudice to petitioner's right to petition for a writ of certiorari.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In remanding the cause to the district court for the taking of any additional evidence whatsoever.
2. In remanding the cause to the district court for the taking of any evidence relating to the

alleged value of the land condemned for power or reservoir purposes.

3. In remanding the cause to the district court for the making of a new award including the claimed water-power value.

4. In failing and refusing to construe the opinion of this Court as a holding that respondent was not entitled to an allowance for water-power value.

5. In failing and refusing to construe the opinion of this Court as holding that the chances of combining respondent's lands into a project without the exercise of the power of eminent domain were too remote to have any legitimate effect upon the valuation of the property.

6. In construing the opinion of this Court as not holding that the question of allowance for water-power value has been finally determined against the respondent.

7. In holding that respondent is entitled to a valuation of his land which will include an allowance for water-power value.

REASONS FOR GRANTING THE WRIT

1. The order of the court below is contrary to the decision of this Court announced on May 17, 1943 (*United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U. S. 266), and the mandate which was issued on July 7, 1943.

The ultimate issue involved is the fair market value of the land condemned by the Government. That question was litigated on its merits through the courts below. The respondent obtained an award based upon the alleged water-power value of the land. The Government contended that the award was erroneous and that no award including any allowance for such water-power value could be sustained. Certiorari was granted and the issue determined by this Court.

The basic question presented to this Court was whether the respondent was entitled to an award based upon the alleged value of the land for water-power purposes. As we construe the Court's opinion, it decides this issue adversely to respondent. In its opinion this Court defined the issue that it was undertaking to determine as follows:

Sec. 25 of the Act authorizes awards covering "the value of the lands sought to be condemned." The storm center of this controversy is whether water power value may be included in respondent's award [319 U. S. at 273].

It then proceeded to decide that question:

* * * For if we assume, without deciding, that rights in the "flow" of a non-navigable stream created by local law are property for which the United States must pay compensation when it condemns the lands of the riparian owner, *the water power value*

which respondent sought to establish cannot be allowed [ibid.; italics supplied].

* * * *

The result is that respondent's privilege to use the power of eminent domain may not be considered in determining whether there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future. If the power of eminent domain be left out of account, the chances of making the combination appear to be too remote and slim "to have any legitimate effect upon the valuation." *McGovern v. New York*, supra [229 U. S.], p. 372. Respondent therefore has not established the basis for proof of the water power value which was asserted [*id.* at 285; emphasis supplied].

The reach of the decision was recognized in the dissenting opinion filed by Mr. Justice Jackson, who stated:

The Chief Justice, Mr. Justice Roberts, Mr. Justice Frankfurter and I understand the Court to hold that property physically adaptable to power purposes, taken by the Federal Government for power purposes among others, is to be valued as worthless for power purposes as matter of law because its projected development might be defeated if the State should revoke the power of eminent domain admittedly possessed by the owner at the time of the taking. * * *

* * * *

* * * By thus cancelling for the purpose the power of eminent domain, it holds as a matter of law that the project was not feasible to execute and that the lands assembled for power purposes, admittedly physically adaptable to the use and taken by the Government for that purpose, have no power utilization value [*id.* at 286, 288-289].

Were the language of the opinions less explicit, it would still be clear that the question of the right to water-power value has been necessarily foreclosed by the decision. The contention advanced by the Government in this Court that the award could not, as a matter of law, include any allowance for the claimed water-power value was based on several distinct grounds:

(a) That under *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, a landowner is not entitled to compensation based upon the availability of his land for power purposes where such availability depends upon the right of the owner to appropriate for his own use the flow of a stream over which the United States has absolute control, and that although the Hiwassee River is nonnavigable at the site of the land condemned, the flow at that point has such a direct and immediate effect upon the federal interest in navigation and flood control and on the admittedly navigable portion of the stream as to vest in the United States the same plenary control over both the navigable and nonnavigable portions of the river.

(b) That the competent proof established conclusively that the property had no value for power purposes; the only proof offered by respondent to establish such value consisted of estimates of value based on the capitalization of predicted future profits from respondent's hypothetical development, and such proof should not have been considered.

(c) That the possible future exercise of the power of eminent domain by the respondent could not be taken into account in determining whether there was a reasonable probability that the land condemned would have been developed or marketed for power purposes in the reasonably near future and that, without the exercise of the power of eminent domain, no such probability existed.

This Court decided that the award could not legally include any allowance for water-power value upon the last of these grounds. It held, first, that in determining whether there was any reasonable probability that this land could be marketed for power purposes to anyone other than the Government, the possible future use of the power of eminent domain must be left out of consideration; and second, that when such possibility is excluded, the prospect of development for power purposes becomes too remote to be included in market value.

Having thus removed from the case the whole question of water-power value, this Court found it unnecessary to pass upon the Government's

other contentions. No award including any allowance for water-power value could be sustained unless this Court decided against the Government's contention that the rule of the *Chandler-Dunbar* case is applicable under the circumstances presented here. That issue could be left undetermined only because this Court decided upon independent grounds that, as a matter of law, the final award could not include such water-power value. It could not have been intended that this case be relitigated through the courts on the issue of water-power value with the basic question of the nature of respondent's interest in the water power still to be determined. Yet that is the situation created by the order to remand issued by the Circuit Court of Appeals. Under that order, as amplified by the opinion, the District Court is free to render a final award based on water-power value, in which event the question which this Court found it unnecessary to decide, i. e., the existence of private property rights to develop and appropriate the flow of the Hiwassee River, arises again for determination.

2. The decision below is in conflict with the principles announced by this Court in *In re Potts*, 166 U. S. 263; *Gaines v. Rugg*, 148 U. S. 228; *Ex parte Dubuque & Pacific R. R.*, 1 Wall. 69; *Sibbald v. United States*, 12 Pet. 488; and *Tyler v. Magwire*, 17 Wall. 253. These cases hold that where the merits of a case have once been decided

by this Court, the Circuit Court of Appeals has no authority to grant a new trial or a rehearing or to permit the introduction of additional evidence without express leave of this Court.

3. The decision below is in conflict with *Merchants' Banking Co. v. Cargo of the Afton*, 134 Fed. 727 (C. C. A. 2d), certiorari denied, 196 U. S. 639; *In re Mifflin Chemical Corp.*, 123 F. (2d) 311 (C. C. A. 3d), certiorari denied, *sub nom. Sheridan v. Rothensies*, 315 U. S. 815; and *Bassick Mfg. Co. v. Adams Grease Gun Corp.*, 54 F. (2d) 285 (C. C. A. 2d), certiorari granted, 285 U. S. 531, certiorari dismissed, 286 U. S. 567, in holding that a litigant who has tried his case on the theory of his own choice should be permitted an opportunity to relitigate after a final decision on the merits. For the same reason the decision below is also in substantial conflict with the decision of this Court in *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399.

4. If the Court should conclude that its previous decision has not disposed of the question whether water-power value may be included as an element of compensation, we here renew our contentions based upon *United States v. Chandler-Dunbar Co.*, *supra*; *United States v. Appalachian Power Co.*, 311 U. S. 377; *Oklahoma ex rel. Phillips v. Atkinson Co.*, 313 U. S. 508; and *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690. If that issue is still open, we think that the order of the

court below is in substantial conflict with the principles established in those cases.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

WILLIAM C. FITTS, Jr.,
General Counsel,
Tennessee Valley Authority.

JANUARY 1944.

APPENDIX

TENNESSEE VALLEY AUTHORITY ACT

[48 Stat. 58, 70, 16 U. S. C., sec. 831x.]

SEC. 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

Upon the filing of a petition for condemnation and for the purpose of ascertaining the value of the property to be acquired, and assessing the compensation to be paid, the court shall appoint three commissioners, who shall be disinterested persons and who shall take and subscribe an oath that they do not own any lands, or interest or easement in any lands, which it may be desirable for the United States to acquire in the furtherance of said project, and such commissioners shall not be selected from the locality wherein

the land sought to be condemned lies. Such commissioners shall receive a per diem of not to exceed \$15 for their services, together with an additional amount of \$5 per day for subsistence for time actually spent in performing their duties as commissioners.

It shall be the duty of such commissioners to examine into the value of the lands sought to be condemned, to conduct hearings and receive evidence, and generally to take such appropriate steps as may be proper for the determination of the value of the said lands sought to be condemned, and for such purpose the commissioners are authorized to administer oaths and subpoena witnesses, which said witnesses shall receive the same fees as are provided for witnesses in the Federal courts. The said commissioners shall thereupon file a report setting forth their conclusions as to the value of the said property sought to be condemned, making a separate award and valuation in the premises with respect to each separate parcel involved. Upon the filing of such award in court the clerk of said court shall give notice of the filing of such award to the parties to said proceeding, in manner and form as directed by the judge of said court.

Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court. Exceptions filed to such award shall be heard before three Federal district judges unless the parties, in writing, in person, or by their attorneys, stipulate that the exceptions may be heard before a lesser number of judges. On such

hearing such judges shall pass de novo upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners.

At any time within thirty days from the filing of the decision of the district judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the circuit court of appeals, and the said circuit court of appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned.

Upon acceptance of an award by the owner of any property herein provided to be appropriated, and the payment of the money awarded or upon the failure of either party to file exceptions to the award of the commissioners within the time specified, or upon the award of the commissioners, and the payment of the money by the United States pursuant thereto, or the payment of the money awarded into the registry of the court by the Corporation, the title to said property and the right to the possession thereof shall pass to the United States, and the United States shall be entitled to a writ in the same proceeding to

dispossess the former owner of said property, and all lessees, agents, and attorneys of such former owner, and to put the United States, by its corporate creature and agent, the Corporation, into possession of said property.

In the event of any property owned in whole or in part by minors, or insane persons, or incompetent persons, or estates of deceased persons, then the legal representatives of such minors, insane persons, incompetent persons, or estates shall have power, by and with the consent and approval of the trial judge in whose court said matter is for determination, to consent to or reject the awards of the commissioners herein provided for, and in the event that there be no legal representatives, or that the legal representatives for such minors, insane persons, or incompetent persons shall fail or decline to act, then such trial judge may, upon motion, appoint a guardian ad litem to act for such minors, insane persons, or incompetent persons, and such guardian ad litem shall act to the full extent and to the same purpose and effect as his ward could act, if competent, and such guardian ad litem shall be deemed to have full power and authority to respond, to conduct, or to maintain any proceeding herein provided for affecting his said ward.



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No. 582

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

UNITED STATES OF AMERICA upon the relation and for the
use of the TENNESSEE VALLEY AUTHORITY,

Petitioner,

v.

W. V. N. POWELSON, assignee and successor in interest of Southern
States Power Company, a Corporation, et al.,

Respondent.

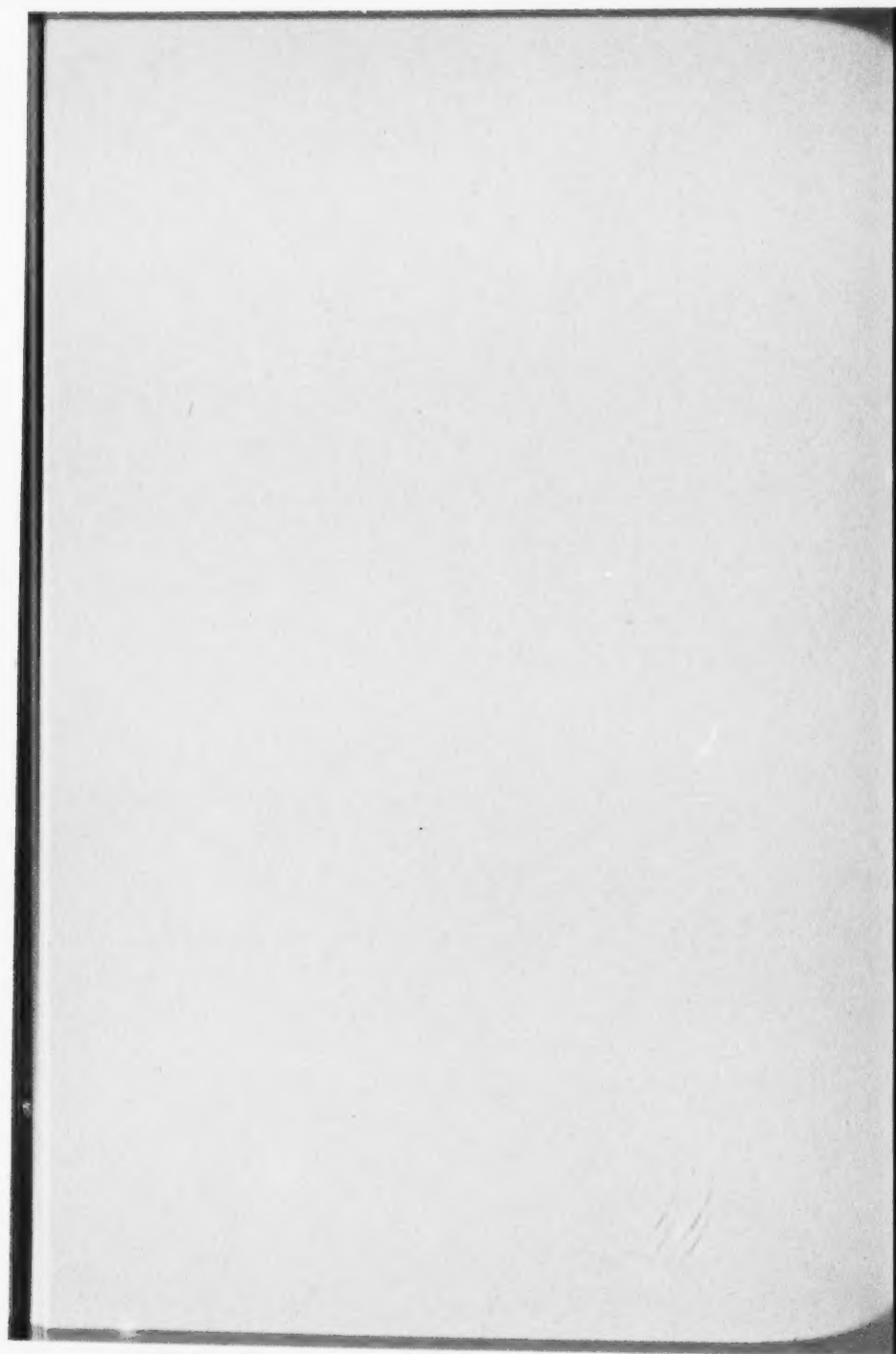
ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

BRIEF OF THE RESPONDENT IN OPPOSITION

GEORGE LYLE JONES,
Asheville, N. C.

GEORGE H. WRIGHT,
Asheville, N. C.

Counsel for Respondent.



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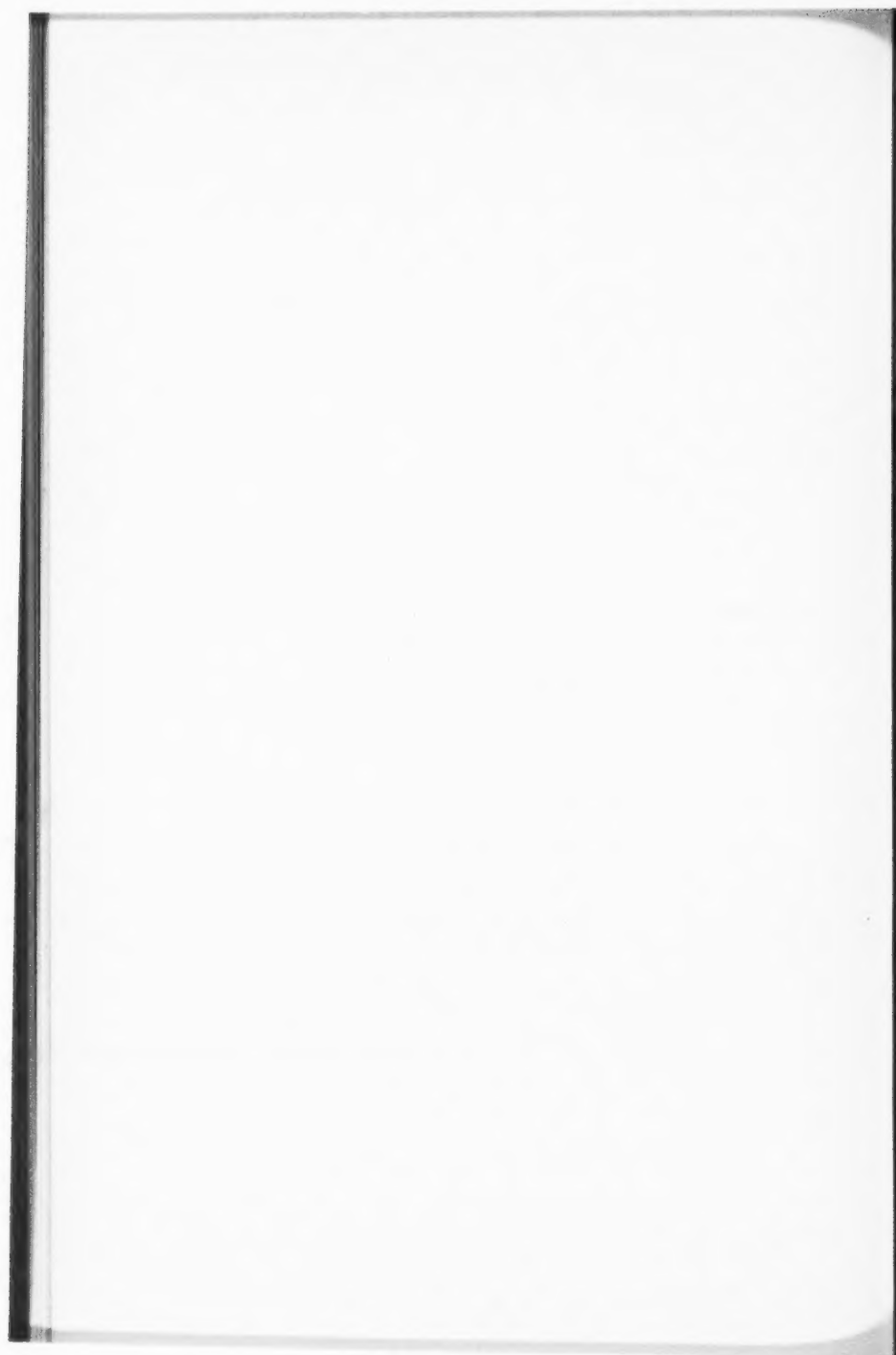
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IN THE
Supreme Court of the United States,
OCTOBER TERM, 1943

No. 582

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE
USE OF THE TENNESSEE VALLEY AUTHORITY,
Petitioner,

v.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF
SOUTHERN STATES POWER COMPANY, A CORPORATION, *et al.*,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Circuit Court of Appeals (R. 6-9) is
unreported.

Jurisdiction

The petitioner invokes the jurisdiction of this Court
under Section 240(a) of the Judicial Code, as amended by
the Act of February 13, 1925, to review an order of the
Circuit Court of Appeals for the Fourth Circuit entered
October 8, 1943.

Questions Presented

The questions presented are:

1. Whether it would be proper for this Court to issue a writ of certiorari at the present stage of the proceedings;
2. Whether the order of the Circuit Court of Appeals entered on October 8, 1943, or the opinion of that Court filed therewith, is in conflict with the opinion of this Court entered May 17, 1943, and the mandate of this Court issued July 7, 1943;
3. Whether there is any sufficient reason for the issuance of a writ of certiorari.

Statute Involved

The statute involved, namely Section 25 of the Tennessee Valley Authority Act of 1933, is set forth in the Appendix at pages 22-24.

Statement

The statement of facts contained in petitioner's petition for writ of certiorari is accurate in the main, but respondent submits that such statement is inaccurate at least in its implications in three particulars.

First, in stating or implying that this Court's decision entered on May 17, 1943, necessarily has the effect of depriving respondent of the possibility of receiving an award including any element of water power value.

Second, in stating or implying that the order of the Circuit Court of Appeals issued on October 8, 1943, was in direction to the District Court to include water power value in the award to be made to respondent for the land condemned.

Third, in omitting to call attention to petitioner's amendment to the motion argued before the Circuit Court of Appeals on October 5, 1943, which amendment sought to prevent the District Court from receiving evidence of adaptability for power or reservoir purposes and from giving any consideration to such adaptability.

ARGUMENT

I

A writ of certiorari should not be issued at this stage of the proceedings.

(a) Substantially same relief already sought at same stage of proceedings on same grounds, and denied.

On November 15, 1943, petitioner filed with this Court a motion for leave to file a petition for writ of mandamus, asking in the alternative that a writ of prohibition be issued. The status of the proceedings in this matter has remained unchanged since that motion was presented and, excluding the record of the motion itself and of the action thereon, that motion was based upon the record now before this Court. It was urged in that motion that the Court below was not proceeding in conformity with the opinion of this Court entered on May 17, 1943, and the mandate of this Court issued on July 7, 1943, as the opinion and mandate were construed by petitioner, and the relief sought was to have this Court require the Circuit Court of Appeals to conform to petitioner's ideas as to what would constitute further procedure in conformity with such opinion and mandate.

The petition for a writ of certiorari now presented sets forth, in practically the same language as the previous motion, petitioner's same reasons for thinking that the lower court is not proceeding in conformity with the opinion and mandate of this Court and seeks substantially the same

relief, namely, that the Circuit Court of Appeals be required to do what the petitioner then thought, and now repeats, should be done to constitute procedure in conformity with the opinion and mandate.

With three exceptions every decision cited in the petition for writ of certiorari was cited in the motion, and for exactly the same point. The three exceptions (*United States v. Appalachian Power Co.*, 311 U. S. 377; *Oklahoma ex rel. Phillips v. Atkinson Co.*, 313 U. S. 508; and *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690) are merely cited in further support of a point for which *United States v. Chandler-Dunbar Co.*, 299 U. S. 53, was cited in the motion. And, as we shall see, the point itself was fully presented to this Court prior to its opinion and mandate and should not be included in the present petition.

(b) The motion seeking mandamus was the appropriate procedure.

The motion as made, looking to the issuance of a writ of mandamus or a writ of prohibition, was the proper procedure for determining whether or not the Circuit Court of Appeals was proceeding in conformity with the opinion and mandate of this Court. *Gaines v. Rugg*, 148 U. S. 228, 238; *In re Potts*, 166 U. S. 263; *In re Sanford Fork & Tool Co.*, 160 U. S. 247; *Ex Parte Sibbald v. United States*, 12 Pet. 488, 492; *Ex Parte Dubuque & Pacific Railroad*, 1 Wall. 69; *Baltimore & Ohio Railroad Co. v. United States*, 279 U. S. 781, 785.

The denial of that motion, which constituted the proper procedure for raising all the questions which properly could have been raised either by the motion or present petition for certiorari at this stage, must have disposed of all matters which this Court thought required attention in the present unchanged status of the proceedings. The denial of the motion without prejudice to the petitioner's right to petition for a writ of certiorari *must have been on the assumption that petitioner would not immedi-*

ately make the same request in the same language, with difference only in the label put on the request. The only purpose, obviously, was not to foreclose the petitioner from requesting a writ of certiorari at a later and appropriate stage of the proceedings.

(c) Petition for writ of certiorari at this time would be premature in any event.

Apart from the fact that substantially the same request has already been made to this Court, and denied, a petition for a writ of certiorari at this time is premature. This whole case was fully argued on two different occasions before this Court, and this Court, by its opinion of May 17, 1943, has discussed fully the matters which it considered important up to that time.

The authorities are numerous and unanimous to the effect that whatever was before this Court and disposed of by it by its opinion of May 17, 1943, is *finally settled*; that this Court, as well as lower courts, in further proceedings are bound by the decree or judgment as the law of the case and that on a subsequent hearing in this Court nothing is brought up, nor can be considered by this Court, but proceedings subsequent to the issuing of the mandate following the decision on the first appeal. *Ex Parte Sibbald v. United States*, 12 Pet. 488; *Tyler v. Magwire*, 17 Wall. 253, 283; *Stewart v. Salamon*, 97 U. S. 361; *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247; *In Re Potts*, 166 U. S. 263; *Gaines v. Rugg*, 148 U. S. 228; *Ex Parte Dubuque & Pacific RR.*, 1 Wall. 69; *Browder v. McArthur*, 7 Wheat. 58; *Panama Railway Co. v. Napier*, 166 U. S. 280; *Roberts v. Cooper*, 20 How. 467, 481; *Illinois v. Illinois Central Railway Co.*, 184 U. S. 77, 91.

The only proceedings in a lower court in this case since this Court issued its mandate on July 7, 1943, are those in the Circuit Court of Appeals disclosed by the record (pages 2-10) resulting in the entry of the order of October 8, 1943,

and the accompanying opinion. It follows that if this Court again considers this case at this time it would and could do nothing but examine that order and opinion for error.

While the record before this Court shows that the Circuit Court of Appeals proposes to have the District Court initially take the proceedings required in conformity with the opinion of this Court and states that the parties should be allowed to present further evidence if they desire to do so, there is nothing whatever in this record to indicate that the District Court will admit, or that the Circuit Court of Appeals would approve the admission of, any improper testimony, or even that the respondent will offer any testimony whatever. As shown by the record now before this Court, respondent did not make any motion with respect to the procedure to be followed by the courts below in making final disposition of this matter. The action taken by the Circuit Court of Appeals resulted from a motion and supplemental motion by petitioner, and presumably was prompted by a feeling on the part of the Circuit Court of Appeals that upon further consideration additional testimony might be needed for the purpose of more fully or clearly presenting the facts at issue between the parties, particularly in view of the fact that this Court had, in a "case of first impression", concluded that the existence of the power of eminent domain could not be taken into consideration. In any event, this Court should not assume that either of the courts below will act in abuse of discretion by improper admission of additional evidence, even assuming that such evidence is presented.

The order of the Circuit Court of Appeals merely remands the case to the District Court to the end that the new award may be made in the first instance by three District Judges. The accompanying opinion provides that the parties should have leave to present additional evidence to assist the lower court in fixing the amount of the new award if they so desire. The order and opinion deal with pro-

cedural matters. They finally adjudicate no rights or liabilities of the parties. On review of this order this Court could make no decision finally determinative of the rights of the parties. Under such circumstances the frequently announced rule of this Court is to grant a writ of certiorari only in an extraordinary case. *Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S. 251, 258; *American Construction Co. v. Jacksonville*, 148 U. S. 372, 384; *Forsyth v. Hammond*, 166 U. S. 506, 514.

Obviously, the time to ask this Court for a writ of certiorari will come, if at all, after the courts below have taken further action on this matter determinative of the rights or liabilities of the parties. A petition for a writ of certiorari at this time is premature.

(d) Issuance of writ of certiorari now might do great injustice to respondent.

While this Court held "that profits, attributable to the enterprise which respondent hoped to launch are inadmissible as evidence of the value of the lands which were taken", it was careful to state that "respondent is, of course, entitled to the market value of the property fairly determined. And that value should be found in accordance with the established rules * * * uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain". This Court, however, stated clearly that it held the foregoing "only" (*U. S. v. Powelson*, 319 U. S. 266). It follows that the tribunals below must make a somewhat different approach to the question of the fair market value of the land condemned.

The usual procedure in such circumstances, and certainly the equitable one, would be to permit the parties to present anew their contentions as to fair market value based on the evidence already in the record and on such additional testimony as may seem necessary in order to enable the trial tribunal to base its award on a sound foundation of

fact, so far as all such testimony is pertinent and competent in the light of this Court's decision. When this has been done each tribunal below, and this Court on appeal, would have before it the facts required for determination of fair market value under the limitations imposed by this Court's opinion, and each tribunal in turn, would be in a position to determine whether any particular element of value should or should not be included in view of the facts as they appear.

To attempt to determine in advance whether any particular element of value should or should not be included is not only contrary to the general practice and basically illogical, but could easily result in great injustice to respondent.

In spite of the limited nature of this Court's holding and the fact that this Court has assured the respondent and others whose lands are being condemned "that value should be found in accordance with the established rules", the petitioner now seeks to deny respondent the benefit of these established rules by preventing the courts below from exercising their sound discretion as to the admission of additional testimony, and even from applying established rules to the record as it stands. If the petitioner succeeds in this, it will have made the "established rules" empty, meaningless, words for the respondent.

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There has been no failure to proceed in conformity with the decision and mandate of this Court.

(a) Conformity question arises only with respect to matters submitted to and decided by this Court.

It is established law that the question as to whether or not procedure in the court below is in conformity with the opinion and mandate of this Court applies only with respect to matters submitted to *and disposed of*

by this Court, and that as to all other matters, the court below is free to proceed under the applicable decisions and rules of law without involving any question of conformity with the decision and mandate. *Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247; *In Re Potts*, 166 U. S. 263; *Gaines v. Rugg*, 148 U. S. 228; *Ex Parte Sibbald v. United States*, 12 Pet. 488; *Ex Parte Union Steamship Co.*, 178 U. S. 317; *Ex Parte French*, 91 U. S. 423.

(b) This Court's decision of May 17, 1943, precluded reliance upon two things, but decided nothing else affecting water power value.

This Court remarked, in its decision, that "The storm center of this controversy is whether water power value may be included in respondent's award", but what this Court actually decided was merely whether certain facts or evidence could be taken into consideration in determining this storm center question. This Court made it perfectly clear that it was approving the general rule that an "owner of lands sought to be condemned is entitled to their market value fairly determined", that "that value may be determined in light of the special or higher use of the land when combined with other parcels", but that "in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future". In this connection the Court referred to the following leading cases on the subject: *U. S. v. Miller*, 317 U. S. 369; *Boom Co. v. Patterson*, 98 U. S. 403; *McCandless v. U. S.*, 298 U. S. 342; *McGovern v. New York*, 229 U. S. 363; *Olson v. U. S.*, 292 U. S. 246, 255. The Court then pointed out that, in the application of these general principles, use had been made below of evidence as to the profits attributable to the enterprise which respondent hoped to launch and of the fact that respondent had the power of eminent domain. In next to the last paragraph of its opinion, this Court states clearly what it

held, and what it held "only", with respect to water power value, as follows:

"We hold only that profits, attributable to the enterprise which respondent hoped to launch, are inadmissible as evidence of the value of the lands which were taken. Respondent is, of course, entitled to the market value of the property fairly determined. And that value should be found in accordance with the established rules (*United States v. Miller*, *supra*)—uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain."

If anything more than the language itself is necessary to show that the Court's holding was limited to probative value and admissibility, of these two things, it can be found in the next succeeding sentence where the Court continues to discuss the admissibility of evidence as follows: "We do not reach the question much discussed at the bar and in the briefs whether evidence of the earnings of respondent's hypothetical four-dam project should have been excluded for the further reason that it was too speculative".

This is what the Court held and this is all that the Court held with respect to water power value, but petitioner tries to read into the decision a final holding that there was no water power value in this case, and to do so refers to the remarks of this Court relating to the amount of value sought to be established for the large or four-dam project and as to the apparent difficulty of proof of water power value in the absence of the power of eminent domain. In this connection, it should be pointed out, as stated in the opinion, that "respondent sought to establish a value of \$7,500,000" and that this value was the value for "an elaborate four-dam hydroelectric project". Petitioner puts particular emphasis upon the Court's statement that without the power of eminent domain the chances of making the combination "appear to be too remote and slim" to have any legitimate

effect upon value and that "respondent therefore has not established the *basis* for proof of the water power value *which was asserted*". This language is immediately followed by the language quoted above, beginning with "We hold *only*". (Italics supplied.)

It should also be pointed out that the passing statements made by the Court as to the water power value for less than the four-dam hydroelectric project were based upon statements which were made by the petitioner in its brief, but which are not supported by the record. If the record is not already clear on the matter, respondent may offer to the court below proof that there was water power value for a project or projects other than the four-dam hydroelectric project, that respondent had all or most of the land for such other project or projects and also that respondent could, without the power of eminent domain, have acquired the necessary additional properties, if any. The alleged admissions as to the necessity of using the power of eminent domain attempted to be supported by quotations from the testimony, which quotations are lifted from their context, are completely misleading. If the record is not already clear on the subject, respondent may present evidence to show that while the power of eminent domain might be necessary to complete any or all projects without paying substantially more for a few parcels of land than respondent would have paid by using the power of eminent domain, nevertheless, respondent could have acquired all necessary lands without having to pay such large prices as to impair substantially the feasibility of the project.

It should be remembered that the record shows that the holdings of respondent in continuous ownership of the bed and banks of Hiwassee River from a point slightly above the North Carolina-Tennessee State Line upstream for a distance of 24 miles, and entirely within the State of North Carolina, were such that 255 ft. of the fall of the river could be developed by two dams located entirely on respondent's

property, creating reservoirs entirely on respondent's lands.*

The record shows that the addition of only 1229 acres owned by strangers to the area owned by respondent in the Powelson reservoir basin would effect a combination constituting all of the land necessary for the Powelson development as adopted by respondent, having a hydraulic head of 245 ft. and a reservoir capacity of 17,250,000,000 cu. ft., or about 400,000 acre ft. [Res. Com. Ex. R-17, offered Com. Tr. 156. See judgment of United States District Court, p. 1057 of Printed Record in this Court for hearing on the merits].

Thus, the addition of only 1229 acres to an area of some 22,000 acres owned by respondent would effect a combination

*The map of level contour lines in the Powelson reservoir basin (Res. Com. Ex. R-257 offered Com. Tr. 1273) shows that a dam at the Powelson site to raise the water there 150 ft. high, namely, to elevation 1425 ft. above sea level, would back the water up Hiwassee River a distance of 14 miles. Res. Com. Ex. R-8 (offered Com. Tr. 125) shows that respondent owned throughout said 14 miles all of the bed and banks of Hiwassee River and all of the land in that basin below the 1425 ft. contour line.

Exhibit R-8 shows that respondent also owned all of the bed and banks of Hiwassee River extending from the Powelson damsite downstream to a damsite, in the State of North Carolina, a fraction of a mile above the North Carolina-Tennessee State Line and all of the land that would be overflowed by a dam at that site to raise the water 105 ft. thereby backing it up the river a distance of 10 miles to the Powelson damsite, and creating a reservoir containing about 2,750,000,000 cu. ft. (Res. Com. Ex. R-17, offered Com. Tr. 156).

From the cross examination of Mr. Powelson:

"Q. * * * Do you remember that back in 1924 and 1925 you employed J. G. White & Company for certain engineering surveys?

* * * *

"A. * * * They estimated on a dam near the State Line.

"Q. That would be the Appalachia site?

"A. Well, there is a site about a mile above Appalachia. We wanted to get a comparison as to that site with the Appalachia. They are just about a mile apart." [Com. Tr. 1752-1753; pp. 292-293 of the printed record for this Court for the hearing on the merits.]

of lands, all in the State of North Carolina, capable of containing both the Powelson and an Appalachia development extending along Hiwassee River in North Carolina throughout a length of 31 miles in which there is a fall of 350 ft., thereby creating an hydraulic head of 350 ft. and a storage capacity of 20,000,000,000 cu. ft., or about 460,000 acre ft., all in one ownership. It would not have been intelligent to burden the former trial by fully developing those possibilities at that time. These two projects would represent but a portion of the four-dam project which respondent hoped to launch.

The Circuit Court of Appeals should not be condemned if it has permitted respondent to introduce additional evidence more clearly to show the water power value of its lands whether as (1) a combination constituting, without the aid of lands owned by strangers, all of the lands necessary to develop for power a fall of 255 ft. in Hiwassee River; or (2) as a part of a combination in which only 1229 acres owned by strangers would be necessary to develop for power a fall of 350 ft. in Hiwassee River, provided it could be shown that there was a reasonable probability that such combination could have been made, without regard to the power of eminent domain.

It is not necessary to speculate as to what this Court thought about the case respondent had made, or could make, without the two kinds of evidence to be excluded, when the Court's opinion made it perfectly clear that "*We hold only*" (Italics supplied) that certain profits are inadmissible as evidence and that "value should be found in accordance with the established rules * * * uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain".

Remembering that this Court not only did not rule out water power value but, on the contrary, expressly stated that value should be found in accordance with the established rules subject only to the limitation imposed by the Court's decision, let us now see what has been done by the Circuit Court of Appeals since this Court's mandate was

issued and whether or not the Circuit Court of Appeals has failed to proceed in conformity with the opinion and mandate of this Court.

(c) Action by Circuit Court of Appeals subsequent to Supreme Court mandate.

It is clear, from the petition for writ of certiorari now under consideration and from the initial and supplemental motions made by petitioner in the Circuit Court of Appeals (R. 3, 4 and 5), that the petitioner's real complaints are, first, against the failure to exclude "from consideration any value alleged to result from the adaptability of the property for power or reservoir purposes", and, second, against the Court's statement that the parties should be allowed, if they desire, to adduce additional evidence as to the value of the property taken, in the light of the Supreme Court's decision.

The fact that the Circuit Court of Appeals has directed that further action in this matter be taken initially by the District Court, rather than by the Circuit Court of Appeals, does not seem to be seriously opposed by petitioner, and it is not believed that such action could be opposed, as it is in the discretionary power of the Circuit Court of Appeals and is clearly the best way to get the necessary further proceedings going.

The Circuit Court of Appeals at the beginning of its opinion accompanying its order of October 8, 1943, says:

"We have given careful consideration to what should be the future procedure in the case, and are of the opinion that it should be remanded to the District Court for further proceedings *in accordance with the principles laid down by the Supreme Court*" (R. 6). (Emphasis supplied.)

The Circuit Court of Appeals next examines the opinion of this Court to determine just what error the Supreme

Court had found in the record as presented to it and what directions this Court had given in its opinion to guide the lower court in further proceedings (R. 7). It cites and quotes from some of the cases cited by this Court as establishing the principles controlling the fair determination of market value (R. 7-8). It is careful to explain why it feels that in the interest of right and justice the case should be remanded to the District Court for further proceedings. It indicates what it feels to be the deficiency in the record making it difficult for a court fairly to determine the market value of respondent's lands on the basis of the record as it stands (R. 8). It expresses the opinion that if the parties desire to adduce additional evidence in the light of the Supreme Court's decision, they should be allowed to do so (R. 9).

In referring to the matter of a value determined in the light of a special or higher use of respondent's land when combined with other parcels, it not only gives effect to the limitation declared by the *Olson* case and quoted by this Court in its opinion, but combines with that an additional limitation established by the opinion of this Court. One is entitled, says the Circuit Court of Appeals, "to have his holdings valued on some other basis than that of numerous small separated tracts of wild mountain land, *if it be found, irrespective of the possession of the power of eminent domain by the landowner, that 'there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future'* ". (R. 9; emphasis supplied)

In its order and opinion the Circuit Court of Appeals makes no attempt to adjudicate any rights or liabilities of the parties. It merely seeks to provide for a redetermination of the market value of respondent's land in the manner it considers most likely to result in a fair determination thereof. It is submitted that not only is there nothing in the order and opinion of the Circuit Court of Appeals in conflict with the opinion and mandate of this Court, but

that, on the contrary, the lower court was careful in sending the case to the District Court to call to the attention of that court the opinion of this Court and the cases cited by this Court as establishing the basis upon which a fair determination of market value of respondent's land is to be made.

(d) There is no lack of conformity.

As heretofore pointed out (ante p. 9), any matter left open by the mandate of this Court may be considered and determined by the lower court.

It is perfectly clear that neither the Circuit Court of Appeals nor the District Court will give any consideration to "profits attributable to the enterprise which respondent hoped to launch" and that the value will be "found in accordance with the established rules (*U. S. v. Miller, supra*)—uninfluenced, so far as practicable, by the circumstance that he whose lands are condemned has the power of eminent domain". Subject to these limitations, this Court has definitely given the courts below the task of finding values; and the action taken by the Circuit Court of Appeals proposes performance of that task in strict compliance with the opinion of this Court and other applicable decisions and rules of law.

The question as to whether or not the parties should be allowed to introduce additional evidence on any of the matters left open by this Court is clearly a matter of judicial discretion.

This Court's opinion and mandate make it the duty of the court or courts below to fix an award for the lands taken and leave open the question as to whether or not there is any water power value, provided only that, as decided by this Court, consideration shall not be improperly given to evidence of profits of the enterprise or to the existence of the power of eminent domain. The record presented as a basis for the present petition for a writ of certiorari not only does not show any conflict with this Court's opinion or mandate, but, on the contrary, shows that the steps taken,

and contemplated, below are for the purpose of solving only the problems left open by this Court and thus performing the task assigned by this Court. The procedure outlined by the Circuit Court of Appeals, including the provision for adducing additional testimony, is clearly within the sound discretion of the court below.

III

There has been no abuse of discretion by the Circuit Court of Appeals.

Without waiting to see what, if any, additional testimony will be offered by respondent, petitioner concludes that respondent should not be allowed the opportunity to offer any additional evidence, apparently on the theory that respondent should have offered full evidence on alternative bases for fear that the basis on which respondent was proceeding might be found improper. It seems to be petitioner's idea that, if respondent has failed to do this, respondent should now be required to take the record as he finds it and that it would be error for the court below to give any further opportunity to offer testimony.

If there ever was a situation which justified the Court's use of its discretion in allowing additional evidence this would seem to be that case.

Evidence as to profits of the enterprise was accepted, and consideration of the existence of the power of eminent domain was taken into consideration by three Judges in the District Court, then by three Judges in the Circuit Court of Appeals, and finally the case on this record was argued before the Supreme Court of the United States. No dissent from consideration of these two matters was voiced by any one of the six Federal Judges below, or by four of the Justices of this Court.

To conclude now that respondent should have foreseen the decision of this Court on those two matters, under all

of the circumstances, and spent the time and money required to present complete testimony on another theory or theories, and, if he did not do so, should not now be allowed to supplement his evidence on value, would be, to say the least, extraordinary, and less than full justice to the respondent.

Certainly this Court cannot say, as a matter of law, that the court below has so flagrantly abused its discretion by making provision for such additional testimony as to call for the issuance of a writ of certiorari at this time and without waiting to see what may actually be done as a result of the order of the Circuit Court of Appeals. That the discretion of the court below may be exercised as was done here with respect to matters not decided by this Court is well established.

The situation here, in some of its aspects, is analogous to that existing in the case of *U. S. v. Appalachian Electric Power Company* in which this Court on October 19, 1942, denied a petition of the United States for the construction by this Court of its mandate to the lower court. This Court declined to interfere in the proceedings in the District Court had for the purpose of carrying into effect the mandate received from this Court although the District Court proposed to allow the taking of additional testimony on a point as to which it deemed such testimony desirable. *U. S. v. Appalachian Electric Power Co.*, 317 U. S. 594.

IV

No basis for issuance of writ of certiorari now.

As stated above, all the arguments made by petitioner in support of its petition reduce themselves, upon analysis, to the one proposition, that the Circuit Court of Appeals is not proceeding, under the applicable decisions and principles of law, in conformity with the opinion and mandate of this Court; but, the petitioner, apparently in an effort to create a basis for the issuance of a writ of certiorari and

escape the fact that substantially the same remedy has heretofore been sought on substantially the same grounds, and denied, now asserts the same conflict with the same decisions but sets the assertion up in four numbered divisions, as was not done in the motion seeking writ of mandamus or writ of prohibition. It may, therefore, be desirable to examine briefly the separate allegations of conflict with other decisions.

Number 1 asserts conflict with this Court's opinion and mandate in this case. This question, as already shown, was necessarily involved in the motion seeking writ of mandamus or writ of prohibition, and disposed of when that motion was disposed. As already shown there is no such conflict.

Number 2 asserts conflict with principles announced by this Court in *In re Potts*, 166 U. S. 263; *Gaines v. Rugg*, 148 U. S. 228, 238; *Ex parte Dubuque & Pacific R. R.*, 1 Wall. 69; *Sibbald v. United States*, 12 Pet. 488; and *Tyler v. Magwire*, 17 Wall. 253.

The decision below is not in conflict with these cases. They merely hold as to matters decided by this Court that, without leave of this Court, the court below is bound and may not again go into such matters. These cases actually support our contention that the court below is not only free to go into matters not decided by this Court but ordinarily must go into them in order to do its duty, and that the court below may in such cases proceed as the Circuit Court of Appeals has proceeded in this case.

Under number 3 it is asserted that the decision below is in conflict with *Merchants' Banking Co. v. Cargo of the Afton*, 134 Fed. 727 (C. C. A. 2d), certiorari denied, 196 U. S. 639; *In re Mifflin Chemical Corp.*, 123 F. (2d) 311 (C. C. A. 3d) certiorari denied, *sub nom. Sheridan v. Rothensies*, 315 U. S. 815, and *Bassick Mfg. Co. v. Adams Grease Gun Corp.*, 54 F. (2d) 285 (C. C. A. 2d), certiorari granted, 285 U. S. 531, certiorari dismissed, 286 U. S. 567. In each of those cases the issue in the case had been decided and an attempt was made by one of the litigants to have the case

reopened and the issue retried. That is not the situation here. The cases are not in point.

As to number 4, the petitioner cites *United States v. Chandler-Dunbar Co.*, supra; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377; *Oklahoma ex rel. Phillips v. Atkinson Co.*, 313 U. S. 508; and *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, and attempts to make out conflict. These cases do not relate to any question that can properly be raised in the present petition. A citation of them merely constitutes an effort to present again the same points that were presented to this Court in briefs and argument before this Court's decision on the merits. It is an effort to get this Court to allow a rehearing on matters presented to it prior to its decision and mandate—to present something which is not now properly presentable by a writ of certiorari.

Petitioner recognizes in its petition (Pages 9 and 10) that although the above question was presented to this Court on the occasion of its first consideration of this case, this Court in its decision did not pass on that question, but found error on other grounds and returned the case to the Circuit Court of Appeals for further proceedings in conformity with its opinion.

What petitioner is now seeking, in effect, is to have this Court at this time rehear the case and amend its former opinion by passing on a question on which it reserved its opinion on the occasion of the first appeal. The authorities are all to the effect that this Court will not do this if indeed it has power to do so. *Ex parte Sibbald vs. U. S.*, 12 Pet. 488; *Tyler vs. Magwire*, 17 Wall. 253, 283; *Stewart v. Salamon*, 97 U. S. 361; *Browder v. McArthur*, 7 Wheat. 58; *Roberts v. Cooper*, 20 How. 467, 481; *Illinois v. Illinois Central Railway Co.*, 184 U. S. 77, 91.

It should be noted that the order of the Circuit Court of Appeals of October 8, 1943, affords no basis for reconsidering the question of the application of the principles of the *Chandler-Dunbar Case* to this case. That order

adjudicates no rights of the parties. It does not adjudge whether or not the respondent is entitled to have an award including an allowance for water power value. The order merely permits the introduction of testimony in order that the Court may determine from the record and in the light of the decision of this Court whether or not such water power value should be included in the award and, if so, to what extent. Until that determination is made there can be nothing in the record since the mandate of this Court was issued on which this Court can base a further consideration of the question of whether water power value should be excluded from respondent's award upon the principles of the *Chandler-Dunbar Case*.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE LYLE JONES,
GEORGE H. WRIGHT,
Counsel for Respondent.

January, 1944.

APPENDIX

Tennessee Valley Authority Act

[48 Stat. 58, 70, 16 U. S. C., Sec. 831x.]

Sec. 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

Upon the filing of a petition for condemnation and for the purpose of ascertaining the value of the property to be acquired, and assessing the compensation to be paid, the court shall appoint three commissioners, who shall be disinterested persons and who shall take and subscribe an oath that they do not own any lands, or interest or easement in any lands, which it may be desirable for the United States to acquire in the furtherance of said project, and such commissioners shall not be selected from the locality wherein the land sought to be condemned lies. Such commissioners shall receive a per diem of not to exceed \$15 for their services, together with an additional amount of \$5 per day for subsistence for time actually spent in performing their duties as commissioners.

It shall be the duty of such commissioners to examine into the value of the lands sought to be condemned, to conduct hearings and receive evidence, and generally to take such appropriate steps as may be proper for the determination of the value of the said lands sought to be condemned, and for such purpose the commissioners are au-

thorized to administer oaths and subpoena witnesses, which said witnesses shall receive the same fees as are provided for witnesses in the Federal courts. The said commissioners shall thereupon file a report setting forth their conclusions as to the value of the said property sought to be condemned, making a separate award and valuation in the premises with respect to each separate parcel involved. Upon the filing of such award in court the clerk of said court shall give notice of the filing of such award to the parties to said proceeding, in manner and form as directed by the judge of said court.

Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court. Exceptions filed to such award shall be heard before three Federal district judges unless the parties, in writing, in person, or by their attorneys, stipulate that the exceptions may be heard before a lesser number of judges. On such hearing such judges shall pass *de novo* upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners.

At any time within thirty days from the filing of the decision of the district judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the circuit court of appeals, and the said circuit court of appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned.

Upon acceptance of an award by the owner of any property herein provided to be appropriated, and the payment of the money awarded or upon the failure of either party

to file exceptions to the award of the commissioners within the time specified, or upon the award of the commissioners, and the payment of the money by the United States pursuant thereto, or the payment of the money awarded into the registry of the court by the Corporation, the title to said property and the right to the possession thereof shall pass to the United States, and the United States shall be entitled to a writ in the same proceeding to dispossess the former owner of said property, and all lessees, agents, and attorneys of such former owner and to put the United States, by its corporate creature and agent, the Corporation, into possession of said property.

In the event of any property owned in whole or in part by minors, or insane persons, or incompetent persons, or estates of deceased persons, then the legal representatives of such minors, insane persons, incompetent persons, or estates shall have power, by and with the consent and approval of the trial judge in whose court said matter is for determination, to consent to or reject the awards of the commissioners herein provided for, and in the event that there be no legal representatives, or that the legal representatives for such minors, insane persons, or incompetent persons shall fail or decline to act, then such trial judge may, upon motion, appoint a guardian ad litem to act for such minors, insane persons, or incompetent persons, and such guardian ad litem shall act to the full extent and to the same purpose and effect as his ward could act, if competent, and such guardian ad litem shall be deemed to have full power and authority to respond, to conduct, or to maintain any proceeding herein provided for affecting his said ward.

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